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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 705

THE UNITED STATES, PETITIONER

v.

ROBERT H. LENSON

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion by the Court of Claims (R. 8) is reported in 63 C. Cls. 420.

JURISDICTION

The judgment of the Court of Claims was entered on April 4, 1927 (R. 10). A motion for a new trial by the Government was duly made and entertained and was overruled by the Court of Claims on October 17, 1927 (R. 10). The Government filed its petition for writ of certiorari on January 17, 1928 (R. 10), and such writ was granted by this Court on March 5, 1928 (R. 11). Jurisdiction to grant the writ exists under the Act of February 13, 1925.

THE QUESTION

The question presented is whether a lieutenant of the Staff Corps of the Navy who has a service, both enlisted and commissioned, of fifteen years, two months and fourteen days and a commissioned service of only three years and seven months is entitled under the applicable statutes, especially the Act of June 10, 1922 (c. 212, 42 Stat. 625; U. S. C., Title 37, Secs. 1, 4), to the pay of the fourth period.

STATUTES

The pertinent portions of the provisions of the Act of June 10, 1922 (c. 212, 42 Stat. 625; U. S. C., Title 37, Secs. 1, 4), are as follows:

> Section 1. That, beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers of the Regular Army and Marine Corps below the grade of brigadier general, of the Navy below the grade of rear admiral, of the Coast Guard, of the Coast and Geodetic Survey, and of the Public Health Service below the grade of surgeon general, pay periods are prescribed, and the base pay for each is fixed as follows:
>
> The first period, $1,500; the second period, $2,000; the third period, $2,400; the fourth period, $3,000; the fifth period, $3,500; and the sixth period, $4,000.
>
> * * * * *
>
> The pay of the fourth period shall be paid to lieutenant colonels of the Army, commanders of the Navy, and officers of corre-

sponding grade who are not entitled to the pay of the fifth or sixth period; to majors of the Army, *lieutenant commanders of the Navy*, and officers of corresponding grade *who have completed fourteen years' service*, or whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army, or who were appointed to the Regular Army under the provisions of the first sentence of said section 24 [act of June 3, 1916, as amended by the act of June 4, 1920, c. 222, 41 Stat. 759, 771]; to captains of the Army, *lieutenants of the Navy, and officers of corresponding grade who have completed seventeen years' service*, except those whose promotion is limited by law to this grade and who are not entitled under existing law to the pay and allowances of a higher grade; and to *lieutenants of the Staff Corps of the Navy*, and lieutenants and lieutenants (junior grade) of the line and Engineer Corps of the Coast Guard whose total *commissioned* service equals that of lieutenant commanders of the line of the Navy drawing the pay of this period. (Italics supplied.)

* * * * *

For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922,

> there shall be included in the computation all service which is now counted in computing longevity pay. * * *

The Act of March 3, 1883 (c. 97, 22 Stat. 472, 473; U. S. C. Title 34, Sec. 231), provides:

> And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the Regular or Volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the Regular Navy in the lowest grade having graduated pay held by such officer since last entering the service * * *.

STATEMENT

The respondent enlisted in the Navy February 25, 1907, and served as an enlisted man until May 2, 1918, when he received a temporary appointment as acting pay clerk. On November 22, 1918, he was temporarily appointed assistant paymaster in the Navy with the rank of ensign, which appointment he accepted November 30, 1918. He was given a temporary appointment as lieutenant (junior grade) from July 1, 1919, and continued so to serve until July 1, 1920, from which date he was commissioned a regular assistant paymaster in the Navy with the rank of lieutenant (junior grade). From June 3, 1922, he was commissioned a regular passed assistant paymaster with the rank of lieutenant and has continued to serve in such

period only from and after April 23, 1924. (R. 7)

rank to the date of the judgment by the Court of Claims (R. 7). He had on June 30, 1922, attained a total service, both enlisted and commissioned, of fifteen years, two months, and fourteen days (R. 7). Respondent has been paid the pay of the fourth [redacted]. He now claims the pay of the fourth period from July 1, 1922, to April 23, 1924, by virtue of having served more than fourteen years prior to such time (R. 5). The Court of Claims held that he was entitled to recover the difference between the amount paid to him as pay of the third period from July 1, 1922, to April 23, 1924, and what would have have been paid him had he received the pay of the fourth period during such time, which amounted to the sum of $1,935.89 (R. 8). In arriving at said conclusion the Court of Claims held that under the applicable statutes fourteen years' service, whether the same be enlisted or commissioned, entitled respondent to the pay of the fourth period.

SPECIFICATION OF ERRORS TO BE URGED

I. The Court of Claims erred in holding that a lieutenant of the Staff Corps who had not served seventeen years in the aggregate and who had less commissioned service than any lieutenant commander of the line drawing fourth-period pay was entitled to fourth-period pay.

II. The Court of Claims erred in failing to give any effect to the word "commissioned" in that

provision of the Act which gives to lieutenants of the Staff Corps of the Navy fourth-period pay if their total commissioned service equals that of lieutenant commanders of the line drawing fourth-period pay.

III. The Court of Claims erred in granting judgment to the respondent.

SUMMARY OF ARGUMENT

The Government contends that under the applicable statutes in order that a lieutenant shall be entitled to the pay of the fourth period he must have (1) seventeen years of service either as an enlisted man or commissioned officer, or both, or (2) a total commissioned service equal to the commissioned service of lieutenant commanders of the line drawing fourth-period pay, none of whom were drawing the pay of that period or could draw such pay without ten years' commissioned service.

ARGUMENT

From the findings of fact made by the Court of Claims it appears that on July 1, 1922, from which date respondent claims the pay of the fourth period, he had attained a total naval service, both enlisted and commissioned, of fifteen years, two months and fourteen days. At such time he had a total commissioned service of only three years and seven months. The pertinent portions of the Act of June 10, 1922, which have heretofore been set out, may be paraphrased into the following:

> The pay of the fourth period shall be paid to * * * lieutenant commanders of the Navy * * * who have completed fourteen years' service * * *; to * * * lieutenants of the Navy, and officers of corresponding grade who have completed seventeen years' service * * * and to lieutenants of the Staff Corps of the Navy * * * whose total commissioned service equals that of lieutenant commanders of the line of the Navy drawing the pay of this period.

From the above it is clear that one of the situations which would have permitted respondent to receive the pay of the fourth period was a total service, both commissioned and enlisted, of seventeen years. It is equally clear that for the time herein questioned respondent could not meet such conditions, as the Court of Claims has found that on July 1, 1922, he had a total service, both enlisted and commissioned, of only fifteen years, two months and fourteen days. (R. 7.) Therefore, the only other provision of the law under which he could possibly claim the pay of the fourth period is that provision which says that officers of his rank may receive the pay of the fourth period when their "total commissioned service equals that of lieutenant commanders of the line of the Navy drawing the pay of this period." The Court of Claims in its opinion has followed the theory that since the statute permits lieutenant commanders of the Navy who have completed fourteen years of service to re-

ceive the pay of the fourth period that, therefore, under the provisions of the statute applicable to lieutenants fourteen years or more of service, whether it be commissioned or enlisted, or both, will entitle a lieutenant to receive the pay of that period. In this it is submitted that the Court of Claims is in error.

Such construction of the statute entirely ignores the word "commissioned" in the provision of the statute which provides that the lieutenant may receive the pay of that period if his commissioned service equals that of lieutenant commanders drawing the pay of such period. We see no justification for ignoring that word. It must be given some meaning. It is a part of the statute. The only meaning that could be given to such word is that before a lieutenant can receive the pay of the fourth period he must have attained the same length of commissioned service as had been attained by that lieutenant commander of the Navy drawing the pay of the fourth period who had the shortest commissioned service of any lieutenant commander of the Navy drawing the pay of such period. There is nothing in the findings of fact by the Court of Claims upon this question. In the absence thereof there can be no recovery by respondent and the findings will support no such recovery. Before respondent is entitled to recover the pay of the fourth period from July 1, 1922, at which time he had a total commissioned service in the Navy of only three years and seven months,

he must show and there must be found by the Court of Claims the fact that at such time there was some lieutenant commander of the Navy receiving the pay of the fourth period who had a commissioned service of only three years and seven months, or less. As heretofore stated, there is no such finding.

As a matter of fact, lieutenant commanders of the Navy must serve fourteen years before receiving the pay of the fourth period, and after serving four years at the Naval Academy their commissioned service must be at least ten years before they have served such fourteen-year period. There was evidence before the Court of Claims that at the time here involved no lieutenant commander drawing the pay of the fourth period had a commissioned service of less than ten years, but, as heretofore pointed out, the Court of Claims made no finding upon that question. That failure by the Court of Claims is not fatal to the Government's contention since the burden rested upon respondent.

CONCLUSION

For the reasons above set forth it is respectfully submitted that the judgment by the Court of Claims should be reversed.

WILLIAM D. MITCHELL,
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HERMAN J. GALLOWAY,
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APRIL, 1927.